(11)

No. 87-1097

In the Supreme Court of the United States

OCTOBER TERM, 1988

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

DONALD B. AYER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1097

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

This brief is filed pursuant to Rule 35.5 of the Rules of this Court to respond to an amicus brief that was submitted by the Ohio Power Company (OPC) in this case. Our submission of this supplemental brief is contingent on this Court's disposition of OPC's motion for leave to file its brief, which was filed both outside the time allowed by this Court's Rules and after we filed our reply brief, and which OPC acknowledges (Mot. 2) presents arguments that "are not presented in any other brief."[1] It is no mere happen-

[1] Like all other amicus briefs in this case, OPC's brief had to be filed pursuant to Rule 36.2 of the Rules of this Court "within the time allowed for the filing of the brief of the party supported." Hence, because OPC is supporting respondents, its brief was due on June 27, 1988. OPC, however, filed its brief more than five weeks later on August 4, 1988, which was more than one week after our reply brief was due and timely filed with the Court. Contrary to OPC's assertion (Mot. 2), the government did not have under Sup. Ct. R. 35.3 "until a week before argument" to file its reply. Rule 35.3 provides quite clear-

stance, moreover, that neither respondents nor any of their supporting amici presented the arguments now offered by OPC. Not only are OPC's arguments totally lacking in merit but they further underscore the dangers of respondents' position.

1. The thrust of OPC's position is, oddly enough, that the District of Columbia Circuit did not go far enough in this case in banning all retroactive rules. Unlike respondents, which readily acknowledge (Br. 19) that the Administrative Procedure Act (APA) does not restrict rules of "secondary retroactive effect" (rules that apply to ongoing activities that commenced prior to the rule's effective date), OPC argues (Br. 6-7) that the APA's prohibition on retroactivity bars an agency from promulgating a rule that applies to future conduct if that conduct commenced before the rule's promulgation and was not then barred by the agency's prior rule. The only exception from this sweeping prohibition that OPC would admit is where Congress has elsewhere provided advance notice of the possibility of "subsequent regulatory developments," thus defeating "an expectation that the party has rights that may not be disturbed by subsequent administrative proceedings" (*ibid.* (footnote omitted)).

OPC's novel proposition of administrative law is only that: novel. It has never been adopted by this Court or, as far as we can discern from examining the cases cited by OPC, by any other court. In particular, this Court has never held that an agency is always barred from regulating

---

ly that "[a] reply brief will be received within 30 days after the filing of the brief for the appellee or respondent, or not later than one week before the date of oral argument, *whichever is earlier,* and only by leave of Court thereafter" (emphasis added). OPC therefore is also wrong in asserting that we would "have ample time to reply to [OPC's] brief" in our reply brief (Mot. 2-3). We can do so only by way of this supplemental brief.

the *future conduct* of a party whenever it has previously approved (or presumably failed to disapprove) of the party's same conduct in the past. The only decision of this Court cited by OPC (Br. 6-7 & n.11, 19-20 n.57) is *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), in which the Court held that the Interstate Commerce Commission (ICC) could not revoke a previously-issued certificate of public convenience and necessity "except as specifically authorized by Congress." But that ruling provides no support for OPC's thesis because it was based on the Court's determination that Congress had denied that very power to the ICC in the Interstate Commerce Act (see *id.* at 430). The Court's holding in no sense announced a generally-applicable principle of administrative law barring retroactive agency lawmaking.

2. OPC's historical evidence for its thesis that the "common law of this nation" supports its proffered construction of the APA is even less persuasive (see OPC Br. 10-14). We do not deny the obvious tensions resulting from the application of a law to past conduct or even, as in OPC's case, to future conduct in a manner that affects past investments. Those tensions, however, are not now and have never been resolved by the application of an unbending principle of common law or natural justice remotely resembling the one invented by OPC, which would effectively bar any law with the slightest retroactive impact. Instead, as the very cases relied upon by OPC demonstrate (see OPC Br. 10-14), those tensions have historically, as they are today, been resolved by the application of familiar, but discrete principles of constitutional law, grounded principally in the Ex Post Facto, Contract, Due Process, and Takings Clauses, and in principles of administrative law barring arbitrary and

capricious action.[2] Contrary to OPC's "historical" evidence, however, the sum of these restrictions and the policies they further within their own discrete areas has not and does not produce a broader overarching common law ban on retroactive laws. See generally Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693-694 (1960) (footnote omitted) ("[T]his natural law theory never attained widespread acceptance in the opinions of the Supreme Court, and it has long been accepted that retroactivity is a ground for holding a statute void only if it contravenes a specific provision of the Constitution."); see also Smith, *Retroactive Laws and Vested Rights*, 6 Texas L. Rev. 409, 411 (1928) ("American authorities denounce retroactivity in the abstract but frequently sustain it in the particular case.").

3. For this reason, moreover, OPC's further contention (Br. 14-18) that the APA "codified" the "common law principle that legislative pronouncements have prospective effect" likewise fails. There was no common law principle barring retroactive legislation to be codified. Instead, as we explained in our opening brief (at 21-23), retroactive rules were generally valid before the APA was enacted, as they are today, so long as their retroactive effect was reasonable and not otherwise barred by law.

Nor is there any merit in OPC's related suggestion (Br. 18-21) that the APA "require[s] that statutory grants of rulemaking authority be construed as authorizing only prospective regulation, absent an explicit statutory authorization to adopt legislative rules affecting past transactions." Certainly, the language in the APA upon

[2] We have, of course, readily acknowledged (Pet. Br. 20-21, 37-38 n.29; Rep. Br. 10) that these discrete principles of constitutional and administrative law may render unlawful certain governmental efforts to impose retroactive laws.

which OPC relies (*id.* at 15 (emphasis in original; footnote omitted))—the words "future effect" in the APA's definition of "rule"—provides no hint that the APA embodies such a canon of construction. OPC, notably, makes no effort to reconcile that canon with its claim that "future effect" amounts to a ban on retroactive rules.

OPC's proposed canon is also not aided by either the Court's decision in *Miller* v. *United States*, 294 U.S. 435, 439 (1935) or what "several Justices observed in *Addison* v. *Holly Hill Fruit Products* [322 U.S. 607 (1944)] shortly before enactment of the APA" (see OPC Br. 18 n.55, 19). *Miller* stands only for the proposition that a regulation will not be read to operate retroactively unless the intention to have that effect unequivocally appears (see 294 U.S. at 439) Here, there is no question that the Secretary's curative rule was intended to apply retroactively. The observations of several Justices in *Addison* are likewise unavailing to OPC, because those views were expressed in dissent. In addition, as we pointed out in our opening brief (at 28-29 n.20), both the majority and dissenting opinions in that case agreed that an agency needs on occasion to promulgate curative retroactive rules, which is the very type of rule challenged in this case (see 322 U.S. at 619, 621; *id.* at 641 (Rutledge, J., dissenting)).

4. Finally, OPC's argument illustrates both the dangers of the District of Columbia Circuit's ruling and why a flat ban on retroactive rules is an unnecessary and inappropriate mechanism for addressing the problems sometimes associated with retroactive lawmaking. For if, as OPC argues, the APA's "future effect" language means that a rule can have no impact on past conduct and not, as we contend, that a rule is legally effective in the future,[3]

[3] OPC argues (Br. 16 n.49) that "future effect" could not refer only to the timing of a rule's legal effectiveness because, given the explicit

then well established, essential agency regulatory activities would become unlawful. Many ongoing activities of regulated entities would be immune from more stringent agency regulation in the future.[4]

Somewhat ironically, the decision of the District of Columbia Circuit that prompted OPC's filing in this case demonstrates precisely why such a total ban on retroactive rules is not necessary to address the harsh consequences sometimes associated with retroactive rules.[5] The court of

---

language of Section 4(c) of the Act, "a clarification of this nature would have been unnecessary and hardly worth the special effort an amendment required." As described in our opening brief (at 30-34), however, the APA's legislative history does not support OPC's assumption that Congress intended a major substantive change by adding the words "future effect." It instead suggests that the language was principally added to conform the definition of rule to the operational provisions of the APA, including Section 4(c). The statements in the legislative history upon which OPC relies (Br. 16) do not, moreover, overcome the specific language in both the House Report and the authoritative Attorney's General Manual on the APA that, speaking directly to the retroactivity issue, deny that the APA was intended to proscribe retroactive rules (see Pet. Br. 31-32, 33-34; Rep. Br. 4). Indeed, the House Report, in a passage quoted in our opening brief (at 32), but never acknowledged by OPC, directly refutes OPC's extreme view that the APA's "future effect" language was intended to preclude agencies from "dealing with past transactions in prescribing rules for the future" (H.R. Rep. 1980, 79th Cong., 2d Sess. 49 n.1 (1946)).

[4] For instance, an agency that once required auto manufacturers to include seatbelts would, under OPC's reading of the APA, presumably be prevented by the APA from requiring the same manufacturer to include air bags in the future (*Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

[5] OPC's filing in this case was prompted by the District of Columbia Circuit's decision in *Natural Resources Defense Council* v. *Thomas*, 838 F.2d 1224 (1988), petitions for a writ of certiorari pending, Nos. 87-2068, 88-60 and 88-61. The court of appeals rejected

appeals rejected OPC's claim based on a careful analysis of the competing public and private interests implicated by the EPA's decision not to exempt OPC's future conduct from its rules.[6] All we seek in this case is that the Secretary's retroactive curative rule likewise not be rejected on the basis of an automatic ban and instead be reviewed under the traditional arbitrary and capricious standard.

OPC's contention that that court's construction of the APA in the present case meant that the Environmental Protection Agency (EPA) was precluded from promulgating a rule under the Clean Air Act, 42 U.S.C. 7401 *et seq.*, requiring more stringent reductions of OPC's future emissions at plants that previously had conducted demonstrations conforming entirely to then-applicable EPA rules (838 F.2d at 1243-1244, 1249-1251). We will soon be filing our response to OPC's petition (No. 88-60) in that case, which raises the retroactivity issue, and hence will not address here the merits of that dispute.

[6] OPC mischaracterizes the District of Columbia Circuit's ruling in its amicus brief in this case. Contrary to OPC's intimation (Br. 9), the court of appeals did not find that EPA's rule was outside the APA's general ban on retroactive rules because it "would not affect [OPC's] 'past transactions' " and would "impose only 'future burdens.' " The court instead stressed that EPA's rule was not automatically barred because it regulated only OPC's future *conduct, i.e.*, its "*future emissions*" (838 F.2d at 1244 (emphasis in original)). The court, moreover, freely acknowledged that the regulation of future conduct would impose burdens on OPC because of its prior investment (*ibid.*) and, as described above, the court determined that those burdens did not render EPA's rule an abuse of discretion only after undertaking a careful inquiry into the full panoply of concerns implicated by EPA's decision (*id.* at 1249-1251).

For the foregoing reasons, and those stated in our opening brief and in our reply brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. AYER
*Acting Solicitor General**

SEPTEMBER 1988

* The Solicitor General is disqualified in this case.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60841